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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C 20548

FILE: B-189394 DATE: February 10, 1978

MATTER OF: National Federation of Federal Employees - Validity of Severance Pay Regulations

DIGEST: Labor union contends that CSC regulation, 5 C.F.R. § 550.701(b)(6), which excludes certain employees from entitlement to severance pay when they are hired by a private contractor engaged by the agency to perform their former functions, is contrary to 5 U.S.C. § 5595 governing severance pay. We find that the regulation is consistent with the statute and is authorized by the statutory provision which empowers CSC by regulation to exclude such other employees as it may designate.

Mr. James M. Peirce, President of the National Federation of Federal Employees (NFFE), has requested a decision on the validity of Civil Service Commission (CSC) regulations, contained in 5 C.F.R. § 550.701(b)(6), that preclude the payment of severance pay to Federal employees in certain situations.

The NFFE states that some Department of Defense activities have begun to contract out to private organizations certain operation and maintenance responsibilities heretofore performed by Federal employees. The NFFE contends that employees terminated in such situations should be entitled to severance pay under 5 U.S.C. § 5595(b) which provides as follows:

> "(b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who--
>
> "(1) has been employed currently for a continuous period of at least 12 months; and
>
> "(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;
>
> is entitled to be paid severance pay in regular pay periods by the agency from which separated."

It is argued that under the terms of the above-quoted statute, all involuntarily separated employees who have at least 12 months continuous service prior to separation, except those removed for cause on charges of misconduct, delinquency or inefficiency, are entitled to severance pay. The NFFE, however, complains that the CSC has promulgated implementing regulations that improperly deprive certain involuntarily separated employees of their entitlement to severance pay. The regulation in question, 5 C.F.R. § 550.701(b)(6), provides:

> "(6) This subpart does not apply to an employee who, as the result of the transfer of the operation and maintenance responsibilities for a Federal project to a private organization, is offered comparable employment with the private organization or within 90 days of the date of transfer accepts any employment with the private organization."

This regulation precludes the payment of severance pay to otherwise qualified employees who are involuntarily separated when their agency contracts out to a private organization responsibilities theretofore performed by such employees and the employees are offered comparable employment with that private organization. The NFFE urges us to invalidate 5 C.F.R. § 550.701(b)(6) on the basis that the statute does not speak to this type of exclusion and it is contrary to the intent of 5 U.S.C. § 5595(b).

Contrary to NFFE's position, however, the statute enumerates a number of exceptions. In this regard 5 U.S.C. § 5595(a)(2)(B)(viii) excludes from coverage:

> "(viii) such other employee as may be excluded by regulations of the President or such other officer or agency as he may designate."

Under Executive Order No. 11257, November 17, 1965, the President delegated to the Civil Service Commission authority to promulgate regulations implementing 5 U.S.C. § 5595 governing severance pay. Pursuant to this authority the Commission issued the regulations contained in 5 C.F.R. Part 550, subpart G, which contains the provision that NFFE now contests.

It is a general principle of law that regulations promulgated by an administrative agency pursuant to statutory authority are valid if reasonably related to the purposes of the enabling legislation. Serritella v. Engelman, 462 F.2d 601 (3d Cir. 1972). A party claiming that a regulation adopted by a governmental agency is invalid has the burden to make its invalidity so manifest that a reviewing authority has no choice except to hold that the agency has exceeded its authority and employed means that are not appropriate to the end specified in the statute. Review Committee, Venue VII, Commodity Stabilization Service, U.S. Department of Agriculture v. Willey, 275 F.2d 264 (8th Cir. 1960), certiorari denied, 363 U.S. 827 (1960). In view of the discretionary authority vested in the CSC pursuant to 5 U.S.C. § 5595(a)(2)(B)(viii) to exclude employees from coverage of 5 U.S.C. § 5595, we are unable to make a finding that CSC exceeded its authority in promulgating the regulation contained in 5 C.F.R. § 550.701(b)(6) that denies severance pay to former Federal employees who have been offered comparable employment by a successor, private contractor.

We find support for our conclusion in Akins v. United States, 194 Ct. Cl. 477 (1971), a case that involved similar arguments to those presented by NFFE. In that case the court was urged to invalidate 5 C.F.R. § 550.701(b)(5), which excludes coverage of the severance pay provisions of 5 U.S.C. § 5595 to former Federal employees offered comparable employment with a public non-Federal organization created by an Act of Congress to perform the employees' former responsibility. The Court of Claims construed 5 U.S.C. § 5595 and its legislative history and held that:

> "* * * the severance pay regulation enacted by the CSC, 5 C.F.R. § 550.701(b)(5), is consistent with the Act and all prior implementing regulations, and is mindful of the Congressional intent and responsive thereto. Further, we hold that the regulation is not arbitrary or capricious, but is well within the discretionary authority of the CSC.* * *."

The NFFE next contends that the CSC regulations are internally inconsistent inasmuch as 5 C.F.R. § 550.701(b)(6) and Federal Personnel Manual, chapter 550, section 7-3(b)(2)(ix), exclude

employees who are offered comparable employment with successor private organizations while 5 C.F.R. § 550.701(b)(2) excludes employees who decline to accept equivalent positions within their agencies when offered. It is argued that the regulations improperly establish different standards for employment with Federal and non-Federal organizations. This issue was also addressed by the Court of Claims in Akins, supra, at pages 487-8, as follows:

> "The CSC was justified in making this distinction between an 'equivalent' position and a 'comparable' position. There is no doubt that certain differences do inhere between Federal service and any other type of public or private employment. For example, the employee who is separated from his position with the Federal Government no longer enjoys the umbrella protection provided by the Civil Service System and other applicable Federal statutes and regulations. Therefore, the creation of an equivalency standard, as it applies to the comparison of employment within and without the Federal service, would be a meaningless act inasmuch as said standard could never be satisfied. As there can be no equivalent employment outside the Federal Government within the accepted and reasonable definition of that term, i.e., 'virtually identical', there can be no offer of such employment. An equivalency standard, therefore, can be applicable only to cases which involve a transfer entirely within the Federal service, in which it is theoretically and practically possible to offer the transferring employee an equivalent position. Such can never be the case when, as here, an employee transfers from a position with the Federal service to a position with a successor public non-Federal agency. Even though the non-Federal employment might offer advantages superior in many respects to Federal employment, it would still not be 'equivalent' thereto. Thus, we believe that the CSC formulation of the comparability

standard expressed in 5 C.F.R. § 550.701(b)(5) was borne not only of administrative innovation but of absolute necessity. As such, we regard it as a reasonable and valid exercise of administrative discretion."

We are of the opinion that the above-quoted rationale is equally applicable to 5 C.F.R. § 550.701(b)(6). In view of the foregoing, we hold that 5 C.F.R. § 550.701(b)(6) is consistent with 5 U.S.C. § 5595 and is a valid and appropriate exercise of the Civil Service Commission's delegated authority to implement the statute.

R.F. Keller

Deputy Comptroller General
of the United States